No. 14327.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR,

Appellant,

vs.

HAROLD S. ANDERSON, JR., *et al.,*

Appellees.

BRIEF FOR APPELLEES.

GIBSON, DUNN & CRUTCHER,
WILLIAM FRENCH SMITH,
JAMES J. RYAN,
634 South Spring Street,
Los Angeles 14, California,
Attorneys for Appellees.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

TOPICAL INDEX

PAGE

TABLE OF AUTHORITIES CITED

Cases

Miscellaneous

PAGE

STATUTES

No. 14327.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR,

Appellant,

vs.

HAROLD S. ANDERSON, JR., *et al.*,

Appellees.

BRIEF FOR APPELLEES.

Statement of Issues.

Appellees operate dining and lodging facilities located near a mine operation in California. Such facilities are utilized by employees of another company which operates the mine. Appellant contends that the employees of Appellees engaged in providing such facilities are subject to the Fair Labor Standards Act, as amended.[1] Accordingly it filed an action for injunction in the District Court.

Appellees contended, in reply, first, that the Act did not cover Appellees' employees; second, that if it were determined that the Act did so, Appellees' establishment was exempt under Section 13(a)(2) of the Act as a retail

---

[1]C. 676, 52 Stat. 1060, as amended by C. 736, 63 Stat. 910, 29 U. S. C. (1952 ed.), 201 *et seq.*, herein referred to as the Act.

and service establishment, and, thirdly, Appellees' employees were exempt as engaged in a local retailing capacity under Section 13(a)(1) of the Act.

The facts were principally established by stipulation, additional facts also being established at the trial.

The District Court dismissed the action and denied Appellant's request for injunctive relief upon the ground that the Act did not cover Appellees' employees. The District Court also found that Appellees' operation was a retail and service establishment.

Appellant thereupon appealed. In view of the circumstances of this case, the issues presented for decision by this Court are the same as those which were presented to the District Court.

Statement of Facts.

Because Appellant's Statement of the Case is incomplete, argumentative in major respects and includes conclusions concerning the significance of the facts stated, Appellees feel it desirable to present their own statement of facts.[2]

The facts are established principally by stipulation [Tr. 14-50]. Additional facts not included in the stipulation were established at the trial by evidence which is uncontradicted in any material respect. The Findings of Fact appear at pages 52 to 74 of the Transcript of Record.

---

[2]All emphasis in this brief is ours except where otherwise indicated. References to the Transcript of Record are designated "Tr." followed by the page number. References to Appellant's brief are designated "App. Br." followed by the page number. References to the exhibits attached to the Stipulation are designated "Stip. Ex.", followed by the letter. Reference to Appellees' exhibits accepted into evidence at the trial are designated "Def. App. Ex. followed by the letter.

Appellees are copartners in a concern doing business as H. S. Anderson Co. Appellees operate an establishment providing dining and lodging facilities principally, but not exclusively, to employees of the Anaconda Copper Mining Company (hereinafter referred to as Anaconda) near Darwin, California. For this purpose Appellees lease certain properties from Anaconda. In connection with the furnishing of dining and lodging facilities to the employees of Anaconda, Appellees operate as an independent contractor in accordance with the terms of a contract, as amended, with Anaconda [Stip. Ex. B]. The management, operation and maintenance functions relative to the provision of the dining and lodging facilities are entirely performed by Appellees. The wages, hours and working conditions of the employees of Appellees are determined by Appellees. Such employees are supervised, controlled and directed by Appellees [Tr. 53].

Approximately 11 persons are regularly employed by Appellees at the Anaconda operation. These employees consist of a manager, a chef, commissary clerk, second cook, dishwasher, waiters, combination men and janitors. In addition to making dining, lodging and commissary service available to employees of Anaconda, such services are occasionally utilized by other persons in the area and by the public [Tr. 53].

Appellees' facilities consist of a dining room, kitchen, a commissary where beer, soft drinks, tobacco, toilet and similar articles are sold, and a lodging facility consisting of a lobby and single and double rooms [Tr. 53-54].

Less than 20% of the employees of Anaconda regularly use the dining facility of Appellee, some 80% obtaining their meals elsewhere. About one-fourth of the em-

ployees of Anaconda utilize the lodging facility. While the number of employees of Anaconda will vary, the average number of employees would be in the neighborhood of 222 to 236 [Tr. 55].

An average of 62 employees utilize Appellees' lodging facility which has a capacity of approximately 75, exclusive of those employed by Appellees. Of these, approximately 49 have regularly used the Appellees' dining facility. Others from time to time for various reasons will use such facilities. Men who do not reside at Appellees' lodging facility are occasionally served in the dining room. Meal times are adjusted principally to accommodate the availability of employees of Anaconda. Appellees' facilities are open to be patronized by the public including guests and visitors, salesmen, members of historical and geological organizations which have interests in the area, and other members of the general public who may be in the area for other purposes. An average of 168 meals per month are served to such customers [Tr. 55-58].

Some of the employees of Anaconda who do not use Appellees' lodging or eating facilities reside in homes or apartments rented to them by Anaconda. Others live either in trailers rented by Anaconda or owned by the employees. Still others, some 29, live in neighboring communities. Approximately seven employees of Anaconda live in the town of Darwin about one mile away. Ten others live in the town of Keeler approximately 22 miles from the Anaconda property. Approximately 10 live in the town of Lone Pine located 37 miles from the Anaconda property. Two others live at intermediate points [Tr. 55-56].

These employees commute daily over paved two-lane highways between such communities and the Anaconda property. The principal mode of passenger transportation is by automobile. There are daily deliveries of mail and freight. A contract motor carrier of ore running between Lone Pine and the Anaconda property provides free transportation to those who desire to make use of it. These runs are made at least six times per day, sometimes as frequently as once or twice an hour. Two additional persons may ride in the cab with the driver. The roads are almost always passable [Tr. 58-59].

The town of Darwin is located approximately one mile from the Anaconda facility over a paved two-lane highway. Anaconda is located between Darwin and State Highway 190 which highway, approximately 6 miles from Darwin, runs from Lone Pine into Panamint Valley. Darwin, with a population of 125, contains a service station, post office, a restaurant known as Darwin's Cafe, which among other fare serves steak dinners[3] [Tr. 60], Crosson's Cafe which serves hamburgers, chili and beans, ham sandwiches and similar items, and Taylor's which is a combination grocery store and dispenser of soft drinks. In addition, a general merchandise and grocery store, known as Lurcott's is located between the Anaconda property and Darwin. Lurcott's conducts a general grocery business including the sale of

---

[3]On two occasions, Appellant states that this cafe is now under new management which "confines" itself to serving ham sandwiches and chili [App. Br. 4, 21]. This statement even if supported would contradict the stipulated facts [Tr. 21], contrary to the Stipulation [Tr. 30]. However, the testimony alleged to support it does not do so; the testimony is not contrary to the Stipulation and by no means purports to be exclusive either as to fare or time of operation.

meats and produce as well as general merchandise. An airport approved by the Civil Aeronautics Authority is also located at Darwin. One employee regularly residing at Appellees' facility owns a home in Darwin. Darwin is not located on Anaconda property [Tr. 59-61; Stip., Exs. E, G, H, I, J, K, L, M, and N[4]].

Olancha is located approximately 34 miles distant from Darwin over a paved highway on the main Los Angeles-Reno highway, U. S. Highway 395. Olancha contains three restaurants as well as three motels. Housing with cooking facilities is also available. These facilities, accommodating 12 persons, rent for $15.00 per week. The motels are available for $3.00 per day. Olancha is the community center for several mine and chemical companies [Tr. 61; Stip., Exs. O, P, and Q].

The town of Keeler is located on State Highway 190 between Darwin and Lone Pine. It is approximately 23 miles from Darwin. Keeler contains a restaurant which serves short orders and meals upon a limited basis, and a grocery store. The population is approximately 150 [Tr. 62; Stip., Exs. R, S, and T].

Panamint Springs is also located on State Highway 190, approximately 23 miles by paved highway from the Anaconda property. Permanent Springs, with a population of 10 to 12, contains a restaurant and a motel to accommodate 30 persons and is open to the general public [Tr. 62; Stip., Exs. U and V].

---

[4]It has been stipulated that Exhibits A through X inclusive and BB, attached to the Stipulation and Order dated October 3, 1953, and Defendant-Appellees' Exhibits A through H inclusive introduced at the trial, could be considered by the Court in their original form [Stipulations before this Court dated April 29, 1954 and May 14, 1954]. These exhibits consist of photographs and documents.

The town of Lone Pine is located on U. S. Highway 395 approximately 38 miles from Darwin, all but 6 miles over State Highway 190 [Stip., Ex. X]. Lone Pine with a population of approximately 1,415 contains several restaurants, motels, a hotel, boarding houses, and rooming houses available to the general public [Tr. 62-63; Stip., Ex. W].

Employees of Anaconda are not confined to Anaconda property or required by Anaconda to eat or lodge at any particular place. Such employees return to their homes during the lunch hour or will bring their own lunches with them to Anaconda facilities [Tr. 64]. Employees of Anaconda, as of September 15, 1952, earned at least from $86.13 to $109.65 per week, in addition to health and welfare, premium pay and other fringe benefits [Stip., Ex. BB, Agreement, pp. 28-29; Art. II of Supplement dated September 15, 1952; Section 4(a) of Amendment dated October, 1953].

Appellees' housing and commissary facilities have operated at a profit. However, the dining facility has operated at a loss. With respect to the employees of Anaconda who utilize Appellees' dining facility, Anaconda under its agreement with Appellees, if necessary, meets any deficit up to the amount of $750.00 per month; salaries and expenses of Appellees' home office, *i. e.,* overhead, are not considered in determining this amount. There is therefore no guarantee of net profit [Tr. 64-66].

Appellant concedes that the commissary clerk is outside the scope of coverage of the Act. Appellant also concedes that even assuming coverage the manager is exempt under Section 13(a)(1) of the Act [Tr. 66].

In the event that the sales and services provided by Appellees at their Darwin operation should be curtailed

or abandoned entirely there would be only a temporary inconvenience to the operation of the mine. The effect upon production at the mine would not be substantial even during this temporary period. There would be no significant effect upon total shipments from the mine, particularly in view of the stocks of ore that are kept in reserve. During the period of a recent strike threat some 20 to 25 employees terminated their employment. Shipments from the mine were not affected as a result thereof [Tr. 68-69].

Appellees' facilities are maintained for Anaconda employees as a convenience only. In the event such activity were curtailed or abandoned some employees using Appellees' facilities might leave the Darwin area. Assuming, however, that as many as one-half of the employees should leave, such employees could be replaced normally within a relatively short time. Those who did not leave could obtain lodging and meals elsewhere in the vicinity. Lodging could be and has been obtained at the housing facilities located at the mine, by purchasing or renting trailers, or in the neighboring communities. Such facilities would in all probability respond to any increased demand [Tr. 69].

Appellees' facilities are not remote and isolated to such an extent that they are removed from ordinary business competition. It is a situation different from one in which the activity is located in a remote and isolated area where competition is nonexistent [Tr. 69].

Appellees' type of facility has become less and less frequent as a means of providing food and lodging for mining employees. Because of improved roads, better transportation and an increased desire for community living

such employees are tending more and more to prefer to live in communities even at considerable distances from their place of work. It is frequent that persons employed in mining operations will live in communities at a distance of thirty to forty miles from their places of work and will commute daily by automobile, bus or other means of transportation [Tr. 69-70].

On several occasions in mining communities in the western states, facilities similar to those of Appellees' and under circumstances similar in material respect to those of Appellee Darwin operation, have been curtailed or abandoned without affecting either the production of the mine or the availability of employees. In one instance, an Appellees' type facility, under similar circumstances, was completely destroyed by fire. It was not rebuilt [Tr. 70-71].

In many mining operations, no facilities such as Appellees' have existed at all. Persons employed at such mining operations have lived or are living at distances ranging from 30 to 38 miles and commute by automobile or bus daily to and from the mine. In some cases as many as one-half of the employees at the mine will so commute [Tr. 71-72].

In 1945 production at the Darwin mine amounted to 150 tons per day. There were 6 housing units and 20 trailers at the mine; and Appellees' facilities were somewhat more utilized than today. During 1953, production was approximately 450 tons per day. There are 61 housing units and 37 trailers at the mine; and an average of 62 persons reside in Appellees' facilities. During this period employment has correspondingly increased at the mine [Tr. 72].

Children of persons employed at the mine attend school at Darwin up to the eighth grade; children in higher grades attend school in Lone Pine, commuting daily by bus. Up until 2 years ago seventh and eighth grade students also commuted to Lone Pine, but now attend school in Darwin [Tr. 72].

Employees who upon obtaining employment at the mine reside and eat at Appellees' facilities frequently will leave such facilities and obtain lodging and their meals elsewhere without affecting their employment with Anaconda. During the month of August, 1953, at least three employees, after having lived at Appellees' facilities, left to obtain lodging and their meals elsewhere without having severed their employment with Anaconda. So many factors affect the supply of labor that the presence or absence of Appellees' type of facility would not be a deciding or important factor in the existence of a labor supply [Tr. 72-73].

Additional facts concerning the issues raised by Sections 13(a)(1) and (2) of the Act, which are either stipulated or established by uncontradicted evidence are as follows:

All of Appellees' annual gross income in the Darwin operation results from the furnishing of goods and services within the State of California [Tr. 29, 73].

All of the meals served, goods sold, or lodging furnished by Appellees at their Darwin Operation, were to persons who consume such meals or goods or utilized the goods and services in the Anaconda area and in the State of California. All of such sales and services are to ultimate consumers and none are for resale. Over 75%

of the total annual dollar volume results from the dining and commissary operations [Tr. 29, 73, 64-65].

The sales and services provided by Appellees at their Darwin operation are recognized and known as retail sales or services in the restaurant industry. The term "retail sale or service" has a recognized meaning in the restaurant industry. The term in the industry means any establishment principally engaged in the preparing and serving of food directly to the consumer thereof generally for consumption on the premises of the establishment. Appellees' sales and services at the Darwin mine are included within this definition and are recognized and known as retail sales and services by the restaurant industry. The term "restaurant industry" includes the industry nationally and in the Southern California area. Appellees are a part of the restaurant industry [Tr. 148-150, 154; Def.-App. Exs. A and H].

The National Restaurant Association is an association representing approximately 80% of the total dollar volume of the restaurant industry of the United States. Any person who is the owner or manager of a restaurant or an executive officer or acts in a supervisory capacity of a restaurant operating company is eligible to membership in the association. A restaurant is defined by the association as any establishment or unit thereof which has as its object the preparation, serving or selling of meals or meal items to the general public or any segment thereof. Appellees come within this definition and are members of the National Restaurant Association [Tr. 148-150; Def.-App. Ex. A].

The Southern California Restaurant Association represents approximately 80% of the restaurant industry in

Southern California upon the basis of dollar volume of business. Those eligible for membership are public eating establishments owned, operated and managed by persons, firms or corporations preparing and serving food to the public or to their own employees. Appellees come within this definition and are members of the Southern California Restaurant Association [Tr. 160-161; Def.-App. Ex. H].

One of the major subdivisions into which the restaurant industry is divided is that of industrial or in-plant feeding establishments also referred to as industrial caterers. Appellees' Darwin operation is recognized and known in the industry as part of such subdivision. Industrial feeding establishments participate in the activities of the National Restaurant Association in the same manner as the other subdivisions of that association. All such subdivisions are treated as part of the restaurant industry for purposes of publications, conventions and other activities [Tr. 149-152; Def.-App. Exs. B, C, D and E].

The United States Census in its 1948 Census of Business and in its proposed 1953 Census of Business has placed Appellees' type of activity in the category of a retail trade and thereby recognized it as a retail activity and as part of the restaurant industry [Tr. 152-153, Def.-App. Ex. F].

The Office of Price Administration established pursuant to act of Congress during the period of World War II, in its survey and compilation of statistics concerning the restaurant industry, prepared during its existence, included Appellees' type of establishment [Tr. 153-154, Def.-App. Ex. G].

Each of Appellees' employees is customarily and regularly engaged during all of his working time in making retail sales of goods or services of which more than 50% of the dollar volume is made within the State of California, his place of employment, and in performing work directly with respect thereto or immediately incidental thereto. Such employees are engaged in a local retailing capacity. The duties of Appellees' employees are described by stipulation on pages 66 to 68 of the Transcript.

Summary of Argument.

1. The language of Section 3(j) of the Act, the section which controls whether or not the Act is applicable to Appellees' employees, is explicit in denying such coverage in that it requires that the activities of such employees must be *closely related* and *directly essential* to the production of goods for commerce. Such activities are not so related or essential to the production of goods for commerce. The legislative history resulting in the amendment to Section 3(j) in 1949 requires this conclusion. Even under Section 3(j) prior to its amendment, the Act did not cover the activities of Appellees' employees. The decisions, including those of the United States Supreme Court, compel this result. The facts in the case clearly distinguish it from decisions relied upon by Appellant. These decisions themselves must be reexamined in the light of later decisions and the action of Congress in passing the 1949 amendments.

Appellees' operation is not remote or isolated. Were Appellees' facilities curtailed or abandoned, substitute facilities are presently available. In any case, existing facilities could readily expand to absorb the additional

demand. In the interim the existing facilities would suffice. Experience in similar situations has shown that the abandonment or curtailment of facilities provided by Appellees has not affected either production or the supply of labor. Therefore, employment in connection with such facilities is not closely related or directly essential to the production of goods for commerce.

2. Even assuming that the Act were held to cover Appellees' employees, Appellees' operation is neverthless a retail or service establishment and therefore exempt under Section 13(a)(2) of the Act. This section, as amended in 1949, establishes three criteria for determining a retail or service establishment. Two of these three criteria have been established by stipulation; the third has been established by substantial evidence—testimony and documentary—which stands uncontradicted. The legislative history resulting in the 1949 amendment to Section 13(a)(2) removes all doubt that Appellees' establishment comes within its terms.

3. Even assuming that the Act were held to cover Appellees' employees, such employees are exempt under Section 13(a)(1) of the Act because they are engaged in a local retailing capacity. The Administrator, pursuant to such section, has defined what constitutes being engaged in this capacity. The facts in this case clearly meet the requirements of that definition.

ARGUMENT.

I.

The Fair Labor Standards Act, as Amended, Does Not Cover the Activities of Appellees' Employees. Such Employees Are Not Engaged in Any Closely Related Process or Occupation Directly Essential to the Production of Goods for Commerce.

A. Section 3(j), Particularly in the Light of the Legislative History Preceding Its Amendment in 1949, Excludes Appellees' Employees From Coverage.

The Fair Labor Standards Act of 1938 was passed by Congress to cover employees who were engaged in commerce or in the production of goods for commerce. Section 3(j) of the Act, as amended, defines the term "produced" as follows:

> " 'Produced' means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, *or in any closely related process or occupation directly essential to the production thereof,* in any State."

Appellant has not contended that the employees involved here are engaged in commerce, nor has it contended that such employees are employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on goods produced for commerce. Appellant does contend, however, that such employees are employed in a "closely related process or occupation directly essential to the production" of goods for commerce.

Prior to the 1949 amendments to the Act, Section 3(j) established the test in this respect to be whether the employees were engaged "in any process or occupation *necessary* to the production" of goods for commerce.

The Wage and Hour Administrator, in interpreting the Act prior to its amendment, placed a very broad interpretation upon the word "necessary", in many cases construing it to mean little more than "convenient". The courts sometimes followed the views of the Administrator. Several cases were decided under the Act prior to its amendment in which "necessary" was thus broadly interpreted.

Prior to amending the Act in 1949, Congress severely criticized this result, among others, as being contrary to its intent in enacting Section 3(j). As a result, this section was amended to substitute for the word "necessary," much stronger words, namely, "closely related" and "directly essential."

The attitude of Congress is clearly revealed in the legislative history of the 1949 amendments. It is particularly clear with respect to the factual situation involved in this case. A review of this history concerning the amendment to Section 3(j), can leave little doubt that it was the general intent to reverse the broad interpretation placed upon the word "necessary" both by the Administrator and by the courts.

The case of *McComb v. Factory Stores Co.,* (N. D. Ohio 1948), 81 F. Supp. 403, was the subject of much comment in Congress. This case involved a question as to whether or not the Act covered persons employed by an industrial eating facility similar to that involved in this case. The facility was located in a plant. The employees

were not permitted to leave the plant and were therefore required to eat at the facility, unless they saw fit to bring their own lunch. This is a degree of "isolation" and "remoteness" equal to or more severe than that in *Consolidated Timber Co. v. Womack* (9th Cir. 1942), 132 F. 2d 101, the case principally relied upon by Appellant. The only difference was that in one case the physical circumstances prevented the obtaining of meals elsewhere, whereas in the *Factory Stores* case, Company regulations did so.

The court in the *Factory Stores* case adopted the view of the *Womack* decision and held that under such circumstances the feeding of employees was necessary to the production of goods for commerce. While this case was pending on appeal, it was brought under criticism in Congress and was in effect repealed by the 1949 amendments. As a result, the case was remanded to the Federal District Court, where it was dismissed. The criticism and consequent expression of intent by Congress, as shown in the following excerpt from the legislative history, are even more applicable to the situation in the instant case.

In discussing the bill which was later approved by both Houses without amendment and enacted into law by signature of the President on October 26, 1949, the Managers on the part of the House at the Senate-House Conference which resulted in the bill, issued a House Managers' Statement.[5] In this report, the House Managers, in discussing the question of coverage, stated:

---

[5]HR Report No. 1453, 81st Congress, 1st session, October 17, 1949.

"Coverage under the act for a large category of employees is determined by the definition of the term 'produced'. The definition is divided into two parts. The first part, which the conference bill leaves unchanged, covers any employee 'producing, manufacturing, mining, handling, transporting, or in any other manner working on * * * goods.' Thus the first part covers employees engaged in actual production activities as opposed, for example, to employees engaged in maintenance, clerical, or custodial work. The second part of the present definition, covering any employee engaged in *'any* process or occupation *necessary* to the production' of goods, has been interpreted by the Administrator and the courts to cover employees of many local merchants, because some of the customers of such merchants are producing goods for interstate commerce. It has made no difference that the merchants sell their goods locally and that such goods do not become a part or ingredient of the goods produced by any of their customers (*McComb v. Deibert* (E. D., Pa. 1949), 16 Labor Cases Par. 64,982). The courts have also held the act applicable to employees engaged in maintaining and repairing private homes and dwellings where such homes and dwellings are being leased by interstate producers to their employees. *Coverage of the act has also been extended to employees of an independently owned and operated restaurant located in a factory* (*McComb v. Factory Stores,* 81 F. Supp. 403 (N. D. Ohio, 1948)).

*"Under the bill as agreed to in conference an employee will not be covered unless he is shown to have a closer and a more direct relationship to the producing, manufacturing, etc., activity than was true in the above cited cases * * *"* (95 Cong. Rec. 14928.)

This is an unusually direct and relevant statement of Congressional intent not to cover the activities of Appellees' employees.

Appellant is well aware of this. In quoting from this statement Appellant edits it in a manner which is an apparent effort to dilute its significance (App. Br. 31).

In expressly distinguishing the *Kirschbaum* case from the *Factory Stores* case, the House Managers go on to say:

> ". . . On the other hand, the proposed changes are not intended to remove from the act maintenance, custodial, and clerical employees of manufacturers, mining companies, and other producers of goods for commerce. Employees engaged in such maintenance, custodial, and clerical work will remain subject to the act, notwithstanding they are employed by an independent employer performing such work on behalf of the manufacturer, mining company, or other producer for commerce. All such employees perform activities that are closely related and directly essential to the production of goods for commerce.
>
> "The bill as agreed to in conference also does not affect the coverage under the act of employees who repair or maintain buildings in which goods are produced for commerce (*Kirschbaum v. Walling,* 316 U. S. 517) or who make, repair, or maintain machinery or tools and dies used in the production of goods for commerce. . . . "[6] (95 Cong. Rec. 14928-9.)

---

[6] *Kirschbaum v. Walling,* 316 U. S. 517, however, was criticized in related respects [see p. 67, below].

The House Managers in further discussion of the question of coverage, stated:

> "The following are some examples of cases in which the Administrator and the courts will no longer be able to hold the act applicable because the activities involved in such cases are not closely related or directly essential to production:
>
> * * * * * * * *
>
> *"All such employees, as well as the employees of the merchant selling his goods locally and employees engaged in providing residential, eating, or other living facilities for factory workers, are quite clearly not performing any activities that are closely related or directly essential to the production of goods."* (95 Cong. Rec. 14929, October 18, 1949.)

In debates in the House concerning the conference bill later enacted into law, Mr. McConnell, one of the House Managers, in reporting to the House on the conference bill stated as follows:

> "Mr. McConnell. * * *
>
> "The conference report resembles much more closely the bill that the House passed than it does the Senate bill. While the statement of the House managers accompanying the report sets forth in detail an explanation of the amendments agreed upon in conference, I wish to call the attention of the House to some of the principal changes which the conference bill makes in the present law.
>
> "First—and this is important—the coverage of the act for a large number of employees is dependent upon the definition of 'production of goods for commerce.' A substantial change has been made in this definition which will have the effect of preventing the Administrator and the courts from extending the

coverage to occupations which are not closely related and directly essential to production.

* * * * * * * *

". . . I would like to call your attention to this fact: Under the present act's definition of 'produced', it is said that employees are engaged in production who are employed in producing, manufacturing, mining, handling, or working on goods in any other manner or in any process or occupation necessary to production. It is only with that one small part of the definition 'or in any process or occupation necessary to production', that we are concerned. For instance, Congress, when it passed the act in 1938, thought that the word 'necessary', was a clear indication of intent. But, while it seems clear enough on the surface, nevertheless the Administrator and, later, the court decisions, have been expanding it beyond what was the original intent of Congress. In other words, they were bringing under coverage of the act people employed to clean windows, or to mow the lawns at factories by calling them necessary to production.

. . .

"The conferees felt that the word 'indispensable' was too rigid, and so we substituted the words 'directly essential', meaning that it was our intention that those in the direct flow of production in interstate commerce should be covered, and not side occupations that were not directly essential in producing goods." (95 Cong. Rec. 14936.)

In the debate concerning the bill, the following was stated concerning the strength of the term "directly essential" and its meaning being not far removed from, if not equal to, the word "indispensable":

"Mr. Barden. * * *

As to the discussion of the words 'directly essential', that language grew out of putting the word

'indispensable' into the section dealing with production. I think this is a fair statement to make: The only reason in the world why the House conferees incorporated 'directly essential' in place of 'indispensable' was that we thought it was just as strong, if not a little stronger. It was not with the idea of giving to the Administrator more power. We wanted to use some language that would be a warning to him: 'This far you can go and no farther.' That was my reason for going along with the language 'directly essential'.

* * * * * * * *

"Mr. Lucas. * * *

"As to 'indispensable' and 'directly essential', which caused some concern to many of my fellow Members, I stand for 'indispensable.' It think it is a word that will not need much litigation in order to define it, and I felt that when the House adopted such a word that it made clear its desire that the Administrator should not use the 'necessary-to-production' theory in order to go out and cover people under this act who were not originally intended to be covered by the Congress which enacted the first law. But, 'directly essential' connotes 'indispensable'. I do not mean to say that they mean the same thing, or that they do not mean the same thing, but I believe that those words will state unequivocally to the Administrator that, 'You shall not use this act to carry the coverage of the law out into the fields which are foreign to the intent of Congress'. So I believe that 'directly essential' may answer our purpose.

"I am extremely gratified that the conferees in their report used examples and cases in explaining 'directly essential', which I used in my argument during general debate on this bill, for 'indispensable'. So I think that our intent is very closely allied." (95 Cong. Rec. 14938, 14939-14940.)

Mr. Lucas earlier had made the following statement concerning the proposed change in Section 3(j):

". . . These changes are needed in order to stem, and in some cases, reverse the action of the Administrator and the courts in bringing under the act many businesses of a purely local type by giving to the word 'necessary' an all-inclusive construction.

". . . The proposed changes would . . . reverse the Supreme Court's ruling that the act applies to a local window-cleaning company doing business wholly within the State but some of whose customers are engaged in interstate commerce or in the production of goods for inter-state commerce—*Martino v. Michigan Window Cleaning Co.,* (327 U. S. 173 rehearing denied 327 U. S. 816). . . . *Nor could the Administrator hold the act applicable as he has in the past to the following:*

* * * * * * * *

"(e) *Employees of an independent cafeteria or canteen located in a factory which produces goods for interstate commerce, the cafeteria serving the employees of the factory—McComb v. Factory Stores Co.* (81 F. Supp. 403).

"The basis, upon which the Administrator and the courts have relied in sweeping all of the foregoing local retail businesses under the act, has been that some of the customers of such businesses are engaged in the production of goods for interestate commerce and therefore the employees of the local retail businesses are engaged in a process or occupation necessary to the production of goods for interstate commerce, notwithstanding that all of their goods or services are sold or rendered within the State to customers located within the State. The rulings of the Administrator and the courts have ignored the history of the law showing the absolutely clear con-

> gressional intent that local business was to be excluded. The amendment to Section 3(j) proposed in the substitute bill would make it clear that the law is to be applied within the bounds originally contemplated." (95 Cong. Rec. 11001.)

Appellant in its brief has cited and quoted repeatedly (App. Br. 14, 15, 28, 29-30, 31, 32, 33, 34) from what it refers to as the "Report of the Majority of the Senate Conferees", and on occasion misleadingly as the "Senate Report" and "Senate Conference Report" (App. Br. 31, 32). Indeed, this is Appellant's only significant reference to the legislative history of the 1949 amendments. Appellant cites this statement as containing an express approval of the *Womack* and *Hanson* cases. Congress, however, in debating and considering the amendments stated no such approval.

Appellant neglects to point out that the document referred to is not a "report" at all, but merely a statement of three senators submitted *after* the conference bill had been debated and adopted by the Senate. It was, therefore, not considered by the Senate in its deliberations concerning the Conference Report and as such has no standing as part of the amendments in so far as legislative history is concerned.

Thus, Senator Wherry with respect to the introduction of the document into the record stated:

> ". . . I now have been asked to object to the report if it is offered in any way on behalf of the Senate conferees with any idea that it is the sense of the Senate conferees that the statement is to be used as a basis for interpreting the law, based upon the historical background.

"I am not objecting if the statement is being offered as an individual statement by the Senator from Florida, the Senator from Utah [Mr. Thomas] and the Senator from Montana [Mr. Murray]. If that is the offer that is being made, and the statement is not to be controlling so far as the interpretation is concerned, and if it is not to be regarded as a report of conferees, then I think there is no harm in receiving it." (95 Cong. Rec. 14870.)

The following is also stated:

"Mr. McFarland. These statements were not read or presented before the conference report was adopted, were they?

"Mr. Pepper [the author of the statement]. They were submitted after the conference report was adopted.

"Mr. McFarland. So they could not be considered as having been adopted by the Senate as an interpretation of the conference report. Therefore I do not see why there should be any objection to three Senators, five Senators, or any other number of Senators, filing their views as to the meaning of this legislation, *because it is definitely clear that the statement is not adopted by the Senate as its interpretation.*" (95 Cong. Rec. 14871.)

* * * * * * * *

"Mr. Knowland. I think it should be made clear that there is some difference—and I think the Senator from Florida will agree with me—between a statement of the House managers or the Senate conferees which is printed in advance, and which is available to Members of the House or the Senate before they vote on the acceptance of the conference report, and a statement which is filed, as the Senator from Arizona has pointed out, after the

Senate has acted, which Senators obviously could not have taken into consideration in determining whether or not they should vote for the conference report. In the normal course of procedure the statement of the conferees, if printed, would be available to each Member of the Senate and the House prior to action.

"This is a statement which was brought in, obviously, after the Senate had already acted on the conference report; *and therefore the statement could not in any degree have influenced the Senate in its decision on the conference report.*" (95 Cong. Rec. 14871-2.)

Mr. Pepper, the author of the statement, said:

"Let it be clearly understood that the statement only expresses the views of the named three Senators as to what is the meaning of the language adopted by the conference. . .

* * * * * * * *

". . . But this is not intended to bind the Senate. . . ." (95 Cong. Rec. 14870, 14873.)

The fact that the statement did not represent the view of the majority which passed the amendment, is shown by the following statement of Senator Taft concerning it:

"I cannot agree with the 'Summary in Detail of the Provisions of the Bill "To provide for the amendment of the Fair Labor Standards Act of 1938",' as placed in the RECORD by Senator PEPPER. *I do not believe that its treatment of the provision defining the term 'produced',* the provisions placing reasonable safeguards upon the authority of the Administrator to sue for the collection of back pay, *and certain sections of the provisions defining the retail and service exemption constitute an accurate state-*

ment of the intent of the conferees or the legal effect of the words of the amendments." (95 Cong. Rec. 14872.)

Indeed, the effort to continue the law as it had been interpreted was rejected when an amendment proposed to specifically accomplish this, was defeated. (See Appx., pp. 1-3):

It is clear, therefore, that since the statement of the three senators involved was not even before the Senate at the time the bill was passed, it can have no standing as part of the legislative history of the 1949 amendments. It was an apparent effort by certain senators to inject into the legislative history of the amendments their opinion as to what the law *should be.* The fact of the matter is that the contentions of these senators, which was that the law in respects relevant here should remain substantially as it had been interpreted, was specifically and definitely rejected. Such intent is clearly expressed in the text of the House Managers' report referred to above, the only report concerning the bill finally enacted into law considered by Congress prior to its enactment.

We feel that the language of Section 3(j) itself should dispose of Appellant's contentions. The use of the terms "closely related" and "directly essential" requires an activity upon which the production process is far more dependent than is true in this case. Any doubt in this respect must be removed by a consideration of the legislative history referred to above. To sustain the Appellant's contention would be to follow the same course followed with respect to the interpretation of "necessary," a course which Congress, in amending Section 3(j), intended to prevent.

B. Even Under the Law Prior to Its Amendment the Act Did Not Cover the Activities of Appellees' Employees.

The principal case relied upon by Appellant is the case of *Consolidated Timber Co. v. Womack* (9th Cir. 1942), 132 F. 2d 101, in which the Court considered the applicability of the Act to employees employed at a cookhouse facility located at a lumber camp in Oregon. One cookhouse was located at a lumber camp where access thereto or therefrom was impossible except by Company train or track speeder. It was admittedly necessary to have a cookhouse at this camp. The other facility was also isolated but operated near a small community in which there was but a single six-stool lunch counter during a part of the time involved. The Court determined that the employees at both facilities were engaged in a "process or occupation necessary to the production of goods in interstate commerce."

The Court in reaching this conclusion did so upon the basis that the cookhouse employees were engaged in an integrated effort to produce goods.

The differences in the factual situation between the *Womack* case and the instant case are at once apparent. These differences will be discussed below.

Equally significant to the factual distinction, however, is the fact that the Court in the *Womack* case relied almost entirely upon the reasoning and conclusions of the United States Supreme Court in the case of *Philadelphia, Baltimore & Washington Railroad Company v. Smith,* 250 U. S. 101, 39 S. Ct. 396, 63 L. Ed. 869, decided in 1919. That case arose under the Federal Employers Liability Act. A large part of the *Womack* opinion on the coverage question consists of quotations from this case.

However, subsequent to the *Womack* decision, and prior to the 1949 amendments to the Act, the United States Supreme Court specifically held that the *Smith* case "should not govern our conclusions under the Fair Labor Standards Act."

> *McLeod v. Threlkeld* (1943), 319 U. S. 491, 496, 87 L. Ed. 1538, 1543.

In the *McLeod* case the Court held that employees engaged by an employer to prepare and serve meals to maintenance-of-way employees of a railroad, were not engaged in commerce within the meaning of the Act. The employers were a partnership with a contract to furnish meals to the railroad employees. The meals were served in a railroad kitchen and dining car attached to a particular gang of workmen and located on the tracks of an interstate carrier. The car was set conveniently to the place of work of the boarders and in emergencies followed the gang to the scene of its activities. The employees paid the contractor for their meals by orders authorizing the railroad company to deduct the amount of their board from wages due, and to pay it to the contractor. The facts therefore were similar to those in the present case.

The issue to be decided was whether such employees were "engaged in commerce," within the meaning of the Act. The holding in the *Womack* and the *Hanson* cases were noted but not approved in a footnote to the decision.

The United States Supreme Court held that such employees were not engaged in commerce, and said:

> ". . . In the Fair Labor Standards Act, Congress did not intend that the regulation of hours and wages should extend to the furthest reaches of federal

authority. The proposal to have the bill apply to employees 'engaged in commerce in any industry affecting commerce' was rejected in favor of the language, now in the act, 'each of his employees who is engaged in commerce or in the production of goods for commerce.' . . . The selection of the smaller group was deliberate and purposeful."

* * * * * * * *

"In the present instance, it is urged that the conception of 'in commerce' be extended beyond the employees engaged in actual work upon the transportation facilities. It is said that this Court decided an employee, engaged in similar work was 'in commerce,' under the Federal Employers' Liability Act and that it is immaterial whether the employee is hired by the one engaged in the interstate business since it is the activities of the employee and not of the employer which are decisive."

McLeod v. Threlkeld, 319 U. S. 491, 493, 494, 87 L. Ed. 1538, 1541, 1542.

These contentions were rejected under the facts of that case, which are very similar to those in the instant case.

With respect to the *Smith* case, which was almost the entire basis for the *Womack* decision, the Court said:

"The Smith Case construed the Employers' Liability Act to apply to a cook and caretaker employed by the railroad to care for a camp car used for feeding and housing a group of the railroad's bridge carpenters. At the time of the accident the cook was engaged in these duties. In holding the cook was 'in commerce' this Court said:

" 'The circumstance that the risks, of personal injury to which plaintiff was subjected were similar to those that attended the work of train employees

generally and of the bridge workers themselves when off duty, while not without significance, is of little moment. The significant thing, in our opinion, is that he was employed by defendant to assist, and actually was assisting, the work of the bridge carpenters by keeping their bed and board close to their place of work, thus rendering it easier for defendant to maintain a proper organization of the bridge gang and forwarding their work by reducing the time lost in going to and from their meals and their lodging place. If, instead, he had brought their meals to them daily at the bridge upon which they happened to be working, it hardly would be questioned that his work in so doing was a part of theirs. What he was in fact doing was the same in kind, and did not differ materially in degree. Hence he was employed, as they were, in interstate commerce, within the meaning of the Employers' Liability Act.' 250 U. S. 101, 104, 63 L. Ed. 869, 872, 39 S. Ct. 396.

"Such a ruling under the Federal Employers' Liability Act, . . . should not govern our conclusions under the Fair Labor Standards Act."

McLeod v. Threlkeld, 319 U. S. 491, 496, 87 L. Ed. 1538, 1543.

The Court criticized the "over-refinement of factual situations."

"The effect of the over-refinement of factual situations which hampered the application of the Federal Employers' Liability Act, prior to the recent amendment, we hope, is not to be repeated in the administration and operation of the Fair Labor Standards Act. . . ."

McLeod v. Threlkeld, 319 U. S. 491, 495, 87 L. Ed. 1538, 1542.

The principal basis for the *Womack* decision as to the coverage of the Act was therefore completely removed by the United States Supreme Court in a later decision specifically involving industrial feeding establishments. In addition, the case has great if not controlling significance in the determination of the question of coverage in this case. Although the question there involved whether the employees were engaged in commerce, the decision has hardly less significance with respect to the question of production of goods for commerce. The Court emphasized the nature and effect of feeding operations by stating:

> "It is not important whether the employer, in this case the contractor, is engaged in interstate commerce. It is the work of the employee which is decisive. Here the employee supplies the personal needs of the maintenance-of-way men. Food is consumed apart from their work. *The furnishing of board seems to us as remote from commerce, in this instance, as in the cases where employees supply themselves. In one instance the food would be as necessary for the continuance of their labor as in the other.*"
>
> *McLeod v. Threlkeld,* 319 U. S. 491, 497, 87 L. Ed. 1538, 1543-1544.

Judge Yankwich, in discussing the applicability of the *McLeod* case in *Tipton v. Bearl Sprott Co.* (S. D. Cal., 1950), 93 F. Supp. 496, discussed below, stated:

> "In McLeod v. Threlkeld, 1943, 319 U. S. 491, 63 S. Ct. 1248, 87 L. Ed. 1538, the question did not turn upon the provision which we are considering now. It turned upon the proposition whether McLeod was engaged 'in commerce.' Nevertheless, because

his occupation related to nutrition,—to feeding,—the case has a significant bearing upon the problem before us."

* * * * * * * *

". . . The language used is very revealing . . ."

93 F. Supp. 496, 501.

The reasoning concerning the *McLeod* case was specifically adopted in *Kuhn v. Canteen Food Service* (N. D. Ill., 1944), 77 F. Supp. 585. That case also involved the question of the coverage of employees of industrial eating establishments. These establishments were located at the plants of a company with whom the employer had a contract for the supplying of food, and served the employees of the producer for commerce exclusively. They were not open to patronage by the general public. In that case, as in the instant case, the facilities were operated not by the Company which produced the goods for commerce, but by an independent contractor.

The Court cited the *Womack* case and certain other decisions under it and then said:

> "But it does not follow from this line of cases that the furnishing of food to employees in a plant is necessary to the production of goods in a plant. No analogy whatsover can be drawn therefrom. As was said in the McLeod case above cited: 'Here the employee supplies the personal needs of the maintenance-of-way men. Food is consumed apart from their work. The furnishing of board seems to us as remote from commerce, in this instance, as in the cases where employees supply themselves. In one instance the food would be as necessary for the continuance of their labor as in the other.' And so with the plaintiffs here; they supplied the per-

sonal needs of the employees of the plant in which the goods were manufactured; such employees consumed any food they purchased from the defendant corporation apart from their work; the furnishing of the food is as remote from the production of goods for commerce as it is remote from commerce; the furnishing of the food is as remote from the production of goods for commerce as in cases where the employees supply themselves; and in the case of furnishing food to a maintenance-of-way man engaged in commerce, the food would be as necessary for the continuance of his labor, as the continuance of the labor of a man engaged in the production of goods for use in commerce." (P. 590.)

Concerning the *Womack* case the Court said:

"The Court in that case cited the case of Philadelphia Baltimore & Washington R. Co. v. Smith, 250 U. S. 101, 39 S. Ct. 396, 63 L. Ed. 869, as applicable to solving the question in that case, but the Supreme Court in the McLeod case above cited, said that the ruling in the Smith case under the Federal Employers' Liability Act, 45 U. S. C. A., §51, et seq., 'should not govern our conclusions under the Fair Labor Standards Act.' Also, in the Womack case the court held that the 'cookhouse was not a separate or independent establishment; it was actually a *part* of the Company's facilities—a link in the chain—whereby it operated its business and a means whereby it accomplished the purpose of its existence' and again 'each is a unit in the facilities necessary to the Company's production of goods for commerce.'

"That case is readily distinguishable from the present case inasmuch as the cafeteria or restaurant operated by defendant corporation (a) was a separate and independent establishment; (b) it was not a part

of the facilities of the Company which operated the plant and produced the goods; (c) it is not shown in the complaint that any restaurant was a link in the chain of production of goods; (d) it is not shown by any allegation of the complaint that the service rendered by these independent establishments of defendant corporation were a means whereby the plant manufacturer accomplished the purpose of its existence. The court is convinced that in cases where the production of goods is in an isolated spot where board cannot be readily obtained by employees, that it would be necessary *for the company to furnish board* to its employees, and in such cases the furnishing of the board would be a necessary part of the production of the goods. But where an independent contractor furnishes and makes available a service to employees of a plant and it is not shown that this service is a part of the manufacturer's business, then the service in furnishing food and refreshments is for the convenience but not necessity of the employees of the manufacturer, and service is not bound by such a close tie as makes the service thus made available to the plant employees necessary to the production of the goods." (Emphasis by the Court.)

Kuhn v. Canteen Food Service, 77 F. Supp. 585, 591.

The case of *Tipton v. Bearl Sprott Co.* (S. D. Cal., 1950), 93 F. Supp. 496, decided by Judge Yankwich, also involved an industrial eating establishment located in a plant in Torrance, California. It was also decided under the Act *prior* to its amendment. The employees of the establishment were held not to be covered by the Act. In this decision, as discussed below, great significance was given by the Court to the fact that the employees

on whose behalf this action was filed were employed by the distributor of food, an independent contractor as here, and not by the employer of the employees to whom the food was sold. In addition, the Court said:

> "The evidence in this case shows nothing more than that, *for the convenience of its employees,* Columbia entered into an agreement whereby it granted a lease to Sprott in order to have available, *for the convenience of such of their employees as desired to avail themselves of it,* cafeteria service.
>
> "The employees were not *compelled* to patronize the cafeteria, although the cafeteria was not allowed to cater to anyone else except the employees and their visitors. *Columbia did not control the hours, wages or conditions of employment of the cafeteria employees. They were Sprott's not Columbia's employees.* The only controls which Columbia exercised were over the hours during which food service was furnished. It also took precautions in order that the employees be not imposed upon by exorbitant prices." (Emphasis by the Court.)
>
> *Tipton v. Bearl Sprott Co.,* 93 F. Supp. 496, 505.

It was found that the eating facility "met or bested the competition in matters of price, food quality and size of portions." (93 F. Supp. 496, 497.)

Judge Yankwich also approves the results of the *Kuhn* decision, and that of *Bayer v. Courtemanche* (D. C. Conn., 1947), 76 F. Supp. 193, discussed below, saying of the *Kuhn* decision that the Court there "distinguished it [the *Womack* case] very successfully" (93 F. Supp. 496, 503). He further states that the plaintiff in the *Tipton* case was contending that the statutory term "necessary" be interpreted to mean "convenient." This contention was rejected.

Relander v. Mason County Logging Co. (Wash. Sup. Ct., 1942), 2 WH Cases 1052, is also directly in point. This case involved a cookhouse at a lumber camp. In determining that the employees of the food facility who were employed by the producer in commerce, and not by an independent contractor, were not covered by the Act, the Court said:

> "The facts which brought the case [Womack v. Consolidated Timber Company, 43 F. Supp. 625] under the Act were clearly distinguishable from those in the case at bar. There the camp was in an isolated place, seventeen miles from any public means of travel and the employees were transported on speeders owned by the company to the camp and were of necessity obliged to get their meals at the cookhouse. Here the camp is served by public highway and a great majority of the men live at home and travel to and fro to work in private cars taking their meals with them and traveling from many points of the surrounding community as far as thirty miles or more from the camp. This is not the case of an isolated camp. The best evidence of the fact that the cookhouse was not necessary to the production of logs is the fact that for five months the work in the woods was carried on while the cookhouse was closed and I think it is significant that the Mud Bay Logging Company carrying on exactly the same kind of operations in the same vicinity for a period of ten years maintained no cookhouse at all at any time."
>
> *Relander v. Mason County Logging Co.,* 2 WH Cases 1052, 1054.

The case of *Bayer v. Courtemanche* (D. C. Conn., 1947), 76 F. Supp. 193, is in point. In that case the employee was employed by an independent contractor

furnishing cafeteria services to production workers in a manufacturing plant engaged in the production of goods for commerce. The Court held that such employee was not covered by the Act,

> ". . . in view of the remoteness of plaintiff's work from the actual production of the goods for commerce, and in view of his employment by an independent contractor and the essentially local nature of restaurants and cafeterias generally, . . ."
>
> *Bayer v. Courtemanche,* 76 F. Supp. 193, 196.

The cases cited by Appellant do not sustain its position. Aside from the status of the law under the *McLeod* case and the 1949 amendments, the factual situations in these cases are different in material respects.

The case of *Hanson v. Lagerstrom* (8th Cir. 1943), 133 F. 2d 120, on which the Appellant relies, is quite dissimilar from the situation in the instant case. It involves an isolated lumber camp. The cookhouse was operated by the producer in interstate commerce and the employees involved were its employees. The only other eating facility available to the employees, was located some 13 miles distant. It was impossible for the employees to obtain transportation to and from this facility except when the Company, on occasion, furnished transportation. Approximately 75% of the employees working at the operation ate at the cookhouse.

The decision was prior to the pronouncements of the United States Superior Court in the *McLeod* case and of course prior to the 1949 amendments to the Act. It relied upon the *Womack* case.

The *Hanson* decision was distinguished in the *Kuhn* case, where the court said:

> "Plaintiffs also cite Hanson v. Lagerstrom, 8 Cir., 133 F. 2d 120, 122. In that case the court said: 'The cookhouse was intended primarily for the benefit of defendant's logging employees and to increase his production operations. * * * It was owned by the defendant and operated by him in connection with his logging operation.' The court followed the earlier Womack case and this later case is also distinguishable on the ground that the cookhouse was an integral part of the business of the defendant and maintained as part of its business. . . ."
>
> *Kuhn v. Canteen Food Service,* 77 F. Supp. 585, 593.

In *Tobin v. Promersberger* (D. C. Minn., 1952), 104 F. Supp. 314, the location of the activity was again isolated. All of the employees were required to live in the facility and an overwhelming number of necessity ate their meals there. The roads were frequently impassable because of ice and snow. Very few employees owned cars, and were dependent upon company transportation. The employees involved were employed by the producer in commerce and not by an independent contractor.

The Court said:

> ". . . It seems evident that as a practical matter the employees are forced by circumstances to eat and live at the defendants' camps. . . ."
>
> *Tobin v. Promersberger,* 104 F. Supp. 314, 317.

Similarly in *Tobin v. Cherry River Boom & Lumber Co.* (S. D. W. Va., 1952), 102 F. Supp. 763, the court was concerned with camp cooks employed in isolated loca-

tions along defendant's railroad. In this decision the court went to great lengths to establish the existence of an employer-employee relationship between the defendant company which was the producer in commerce and the employees employed at the cookhouse facility. The court based its decision upon this relationship.

Appellant also relies on *Hawkins v. E. I. DuPont de Nemours & Co.* (4th Cir., 1951), 192 F. 2d 294 in support of its position. In that decision, the employees who ate at the in-plant facility operated by the defendant, were compelled for security reasons to remain in the plant continuously under guard throughout the working day and were not permitted to leave the premises to obtain food during their lunch period. This constitutes *total* isolation in the interest of the producer for commerce. The employees involved were employed by that producer and not by an independent contractor.

It should also be noted that the Court apparently did not consider the legislative history of the 1949 amendment to Section 3(j). It rather relied almost entirely upon an Interpretative Bulletin of the Administrator which itself apparently gave little or no consideration to that history. Indeed, if anything, the Bulletin appears to be based upon the "Statement of the Majority of Senate Conferees," cited so extensively by Appellant in its brief, and which was rejected (see p. 24 *et seq.*, above).

Appellant also relies upon *Kirschbaum Co. v. Walling* (1942), 316 U. S. 517, 86 L. Ed. 1638. This case was among the early decisions of the Supreme Court concerning the scope of the Fair Labor Standards Act. It, of course, must be constructed in the light of the many cases, including the *McLeod* case, which have followed, and the subsequent action of Congress.

Contrary to the statements of Appellant, even this case was the subject of some criticisms in Congress during the consideration of the 1949 amendments (see p. 67, below). Congress however did not overrule the results of that case but specifically distinguished it from the facts of the present case. (See quotations from the Report of the House Managers, pp. 18-19, above.)

The *Kirschbaum* case and later cases have made it very clear that Congress, even in the Act before its amendment, did not exercise the full scope of the commerce power. The Court said:

> ". . . The history of the legislation leaves no doubt that Congress chose not to enter areas which it might have occupied. . . ."
>
> *Kirschbaum v. Walling,* 316 U. S. 517, 522, 86 L. Ed. 1638, 1647.

Actually the problem in that case was quite different from that involved here. The Court in the *Kirschbaum* case warned of the hazards of attempting to apply a decision based upon one state of facts, to another and different factual situation. The *Kirschbaum* case is not authority for Appellant's position here.

Therefore the Act would not cover Appellees' employees, even if the law were looked to as it existed prior to the 1949 amendments and without a consideration of the legislative history which led to such amendments.

C. The Test to Be Applied in This Case Is Whether or Not the Activities of Appellees' Employees Are Closely Related or Directly Essential to the Production of Ore for Commerce. The Facts in This Case Show That They Are Not.

The intent of Congress is clearly stated in the amended Section 3(j) and in the legislative history with respect thereto. Quite aside from the expression of legislative intent, however, the application of the test to determine the question of coverage in this case must sustain the position of Appellees.

The findings of the District Court, of course, must be affirmed unless clearly erroneous.

> Federal Rules of Civil Procedure, Sec. 52(a)
>
> *Kam Koon Wan v. E. E. Black, Limited* (9th Cir. 1951), 188 F. 2d 558, cert. den., 342 U. S. 826, 96 L. Ed. 625.

(1) *Appellees' Facility Is a Separate and Independent Establishment. The Employees Involved Are Employed by an Independent Contractor and Not by Anaconda. Appellees' Facilities Are Therefore Not Part of Any Integrated Effort to Produce Goods for Commerce.*

In the *Womack* case the facility was operated by the Company and not by an independent contractor as in this case. The decision in the *Womack* case states as one of its grounds for decision:

> ". . . [the facility] was not operating with the intent or purpose of showing a profit to the owners from the sale of food or service, but to render a very necessary assistance to the business of the Company, which was the production of logs in interstate com-

merce. The cookhouse was not a separate or independent establishment; it was actually a *part* of the Company's facilities—a link in the chain—whereby it operated its business and a means whereby it accomplished the purpose of its existence. . . ." (Emphasis by the Court.)

Consolidated Timber Co. v. Womack, 132 F. 2d 101, 107.

That the employees were employed by an independent contractor furnishing eating facilities to a plant and interested in making a profit, rather than by the producer of goods for commerce, was a factor which alone was a basis of distinction recognized in *Tipton v. Bearl Sprott Co.* (S. D. Calif. 1950), 93 F. Supp. 496.

In this respect and in referring to the *Armour and Co.* case relied upon by Appellant, Judge Yankwich stated:

"I think this approach is important because, in the case on which Sprott relies,—Armour & Co. v. Wantock, 1944, 323 U. S. 126, 65 S. Ct. 165, 89 L. Ed. 118,—Mr. Justice Jackson referred to the fact that, while the question whether employees are covered by the Fair Labor Standards Act must be determined by the work in which the employee engages, it is important in each case to determine *by whom the employee was hired.* His Opinion states: 'The fact that respondents were hired by an employer which shows no ostensible purpose for being in business except to produce goods for commerce is not without weight, even though we recognized in Kirschbaum v. Walling, that it might not always be decisive, 316 U. S. [517], at page 525, 62 S. Ct. at page 1121, 86 L. Ed. 1638. . . .'

* * * * * * * *

"Whether we will it or not, when we interpret social statutes, we have to bear in mind the economic realities to which they were directed, and the position of the employee who seeks coverage.

"In determining that position, one of the elements to consider is *by whom he is employed.* In this case, as appears from what has already been said, the employment was by Sprott who had undertaken, *as an independent contractor,* under a lease, to operate a cafeteria upon premises owned by Columbia, which were on land contiguous to the building in which the operations of the steel company were carried on.

* * * * * * * *

"In ascertaining whether the employees of Sprott were engaged in interstate commerce, we must be satisfied that what they did was necessary to the production of the goods of the lessor,—that is, Columbia. *Columbia, not Sprott, was engaged in manufacturing steel for interstate commerce."* (Emphasis in each quotation by the Court.) (Pp. 499, 500.)

In distinguishing the *Womack, Hanson* and *Armour and Co.* cases in this respect, Judge Yankwich said:

"In applying the test which Mr. Justice Jackson laid down in Armour & Co. v. Wantock, 1944, 323 U. S. 133, 65 S. Ct. 168, 89 L. Ed. 118,—in determining the relationship of the parties, we are concerned, to some extent, at least, with the question of *who is the employer.* In these three cases, the employer was the person *who was actually engaged in producing goods for interstate commerce. . . .*" (Emphasis by the Court.)

Tipton v. Bearl Sprott Co., 93 F. Supp. 496, 499, 500, 502.

The fact therefore that Appellees are independent contractors and that the employees involved are employed by Appellees and not by the producer of goods in commerce, is very significant in showing that Appellees' activity is not part of any integrated production process.

Appellant attempts to attach some significance to the contractual arrangement between Appellees and Anaconda. We submit that so long as an independent contractor relationship exists—and it is admitted by stipulation—the details to which Appellant refers, cannot have significant weight—certainly not in Appellant's favor. The fact, for example, that the Union representing Anaconda employees may under this contract discuss food and lodging matters with Anaconda cannot bind Appellees, who must look only to their contract with Anaconda. Concerning the quality of food, price and other concerns of the Union and Anaconda, a similar situation existed in the *Tipton* case where the eating facility "met or bested the competition in matters of price, food quality and size of portions" (93 F. Supp. 497).

(2) *If Appellees' Facilities Were Abandoned or Curtailed, the Meals and Lodging Provided Thereby Could Be Presently Obtained Elsewhere.*

Certainly the best, if not the only, significant test to determine whether an activity is closely related or directly essential, would be the consequences which would follow should that activity be curtailed or abandoned. It is closely related or directly essential only to the extent that the productive process is substantially dependent upon its existence. "Closely related" or "directly essential" can only mean that the activity is a sufficiently important part of the production process, so that its removal would, in a substantial respect, prevent or cripple that process.

The location of Appellees' facilities is by no means remote or isolated. The District Court found as a fact that:

> "[Appellees'] facilities are not remote and isolated to such an extent that it is removed from ordinary business competition. It is a situation different from one in which the activity is located in a remote and isolated area where competition is nonexistent." [Tr. 69.]

Such a finding is amply supported by the evidence, most of which is by stipulation.

In the face of a finding to the contrary, Appellant nevertheless refers to the location of the facilities in question as "one of the most remote and isolated parts of the country" (App. Br. 11). One wonders what experience could cause such a statement concerning a location only 34 miles over a two-lane paved highway from U. S. Highway 365, the main artery between Los Angeles and Reno, and all but 6 of such miles being on State Highway 190.

The basis of the *Womack* decision was that it was remote and isolated and therefore that feeding of the employees was so essential to their work that the preparation and serving of meals was necessary to the production of timber. In this connection, Judge Carter in his decision in the instant case, states:

> "I have given you one extreme. On the other hand, we have a different kind of situation here entirely. We have a mining operation within one mile of a small town, an ordinary town. There are some cafes nearby in that town and other towns, there are good roads from one place to another. So you

get away from this picture of isolation, and you have a problem that I do not think comes within that rule." [Tr. 164.]

Some 29, or almost 14% of the Anaconda employees live and eat in the surrounding communities, Lone Pine, Keeler, Darwin and elsewhere. This is the best possible evidence that it is feasible to obtain board and lodging elsewhere than at Appellees' facilities. It is clear from the evidence that Lone Pine alone, with numerous restaurants, hotels and boarding and rooming houses, is accessible and available to provide board and lodging for the employees who now board and lodge at Appellees' facilities, should such be necessary. Appellant in effect concedes this (App. Br. 12). Some 10 employees by choice live in Lone Pine and commute daily. The fact that school children also commute confirms the fact that this is not only a possible alternative, but also a usual one. Lodging may also be obtained in other communities.

In excess of 80% of the Anaconda employees do not eat at Appellees' facility. 75% do not live at the facility. This means that only some 49 employees would have to obtain board and lodging in surrounding communities in the event Appellees' facilities were abandoned. An additional 13 who live at the facility but do not eat there, would have to find lodging. Almost one half the number of employees of Anaconda who would be displaced if Appellees' facility were abandoned, already live and eat in the surrounding communities. And sometimes the number of employees who reside in Appellees' facilities is as low as 30.

At least one-half of the employees who utilize Appellees' facilities own their own cars. Assuming that the other

half do not own their own cars, it would be quite usual to obtain rides with the half that do, or others that regularly commute from the surrounding communities. In addition, transportation to and from Lone Pine, ranging in frequency from six times daily to once or twice an hour, is available. All of the communities are connected by paved two-lane highways, open the year around with only rare exceptions which are quickly removed.

No significant problem with respect to obtaining meals or food would exist. Two restaurants already exist at Darwin, one of which, among other things, already serves steak dinners. In addition, there are two grocery stores where food may be obtained. Meals are also available in the surrounding communities.

Thus the facts show without any significant contradiction that even if Appellees' facilities were shut down that those employees of Anaconda who eat and reside there could find presently existing facilities to substitute for those provided by Appellees.

Three employees presently utilizing Appellees' facilities testified that if such facilities were shut down they would obtain food and lodging elsewhere. Such an occurrence would not affect their employment with Anaconda. One owned a home in Darwin where he would move [Tr. 103-104, 106-107, 110-111].

In any case, the existing facilities, even assuming some of them not to be the best substitute for Appellees' facilities, would nevertheless be quite adequate as a temporary measure pending the obtaining of better facilities. For example, even some of the housing facilities which Appellant claims are the more expensive, are actually within the means of the Anaconda employees—certainly on a

temporary basis. As of September 15, 1952, these employees earned at least from $86.13 to $109.65 per week in addition to health and welfare, premium pay and other fringe benefits.

Appellant in its brief quotes the rates for the most expensive motel accommodations as being out of the question for the "ordinary miner." Actually this most expensive rate upon a daily, not weekly or monthly, basis would cost each of two employees $82.50 per month, perhaps one-fifth of the monthly income of the lowest paid employee. Other accommodations are, of course, much lower in cost.

In addition, many employees who reside and eat at Appellees' facilities upon obtaining employment at the mine, frequently leave such facility. Upon doing so, they obtain lodging and their meals elsewhere without affecting their employment with Anaconda. During the month of August, 1953, for example, this was done by at least three employees without affecting their employment relationship. It is obvious therefore that such employees could just as well temporarily obtain lodging and meals at other places pending their obtaining a permanent location. Appellees' facilities cannot be in any essential in this respect. Indeed, the District Court specifically found that the presence or absence of such facilities would not be a deciding or important factor in the existence of a labor supply.

The District Court also found that Appellees' facilities are maintained for the convenience of Anaconda employees only.

It was found, too, that in the event Appellees' facilities were curtailed or abandoned, the employees who might leave could be replaced normally within a relatively short time. Those who did not leave could obtain lodging and meals elsewhere in the vicinity. Lodging has been and could be obtained at the housing facilities located at the mine by renting or purchasing trailers, or in the neighboring communities. Meals, groceries, commissary and similar items could be obtained at Lurcott's store, at eating and grocery establishments located in Darwin and in the surrounding communities. In any case such facilities, in all probability, would respond to any increased demand.

It was further specifically found by the District Court that there would only be a temporary inconvenience to the operation of the mine in the event that Appellees' facilities should be curtailed or abandoned entirely. Even during this temporary period the effect upon the production at the mine would be insubstantial. In such event there would be no significant effect upon total shipments from the mine, particularly in view of the stocks of ore that are kept in reserve. The correctness of this finding is shown by actual experience which is uncontradicted, namely, that during the period of a recent strike threat some 20 to 25 employees terminated their employment without affecting shipments of ore from the mine as a result thereof.

(3) *Even Assuming That Equivalent Facilities Were Not Instantly Available Upon the Abandonment or Curtailment of Appellees' Facilities, the Already Existing Restaurants, Stores and Housing Facilities Could Quickly Meet the Additional Demand.*

In determining whether or not Appellees' facilities are closely related to or directly essential to the production of goods for commerce, it is necessary to consider what, as a matter of common knowledge and reasonableness, would occur in the event of the abandonment or curtailment of such facilities. Appellant contends that we cannot look to what would happen if Appellees' facilities were curtailed or abandoned, citing the *Womack* case.

But this is not what Womack says. As quoted by Appellant, *Womack* says, ". . . it is not what could have been the fact, but what actually was the fact, upon which the decision must rest." (132 F. 2d 101, 107.) That case thus states that what must be looked to are the facts as they are, not what they might be. We do not take issue with this statement because it does not—indeed it could not—be construed to hold that the situation cannot be looked to as to what would happen if the Appellees' facility were abandoned or curtailed. This is part of "what the facts actually are." Otherwise it would be impossible to apply the test established by the Act, namely, whether the activity is closely related or directly essential to the production of goods.

How else can the significance of an activity be determined, except to consider the consequences of its absence. It is absurd to say that we can look only at a static situation—only the one which exists at the instant of consideration. A simple example should suffice. If it were necessary to determine whether or not a fire department were directly essential to the safety of a community, the

obvious consideration would be the consequences of not having a fire department. Appellant, however, would have us conclude that merely because there was no fire in progress at the time of the consideration, a fire department is not essential to the safety of a community. The only element of any significance is what may happen as a matter of common knowledge, if no fire department were established.

Thus in the case cited by Appellants concerning firemen,[7] the Court in considering this very question, and as quoted by Appellant, said: ". . . in the event they [the communities] were destroyed by fire the smooth functioning of the plant would be interrupted" (208 F. 2d 805, 811).

In the instant case the facts show there would be no such interruption. In addition, Appellant itself relies on facts not part of what it says are the "facts as they are," in attempting to make significance out of the fact that the facilities were once operated by Anaconda.

If within a short time following the abandonment or curtailment of Appellees' facilities, substitute facilities, not instantly available, should shortly become available, it is clear that the abandoned facilities could not possibly be directly essential to the production of ore for commerce. This is particularly true if facilities, even though not as desirable, are nevertheless available during the interim. The fact therefore that this potential situation existed would be most relevant in determining the question of whether the activities of Appellees' employees are closely related or directly essential to the production of goods.

---

[7]*General Electric Co. v. Porter,* 208 F. 2d 805; cert. den., 347 U. S. 951.

The facts show in the instant case that present facilities exist to take care of any additional demands resulting from the abandonment of Appellees' facilities. But even if this were not the case, facilities are presently available which could be readily expanded to accommodate the needs of such employees.

Thus there are presently two existing restaurants in nearby Darwin, one of which serves steak dinners and which, without any question, would be most happy to serve more of such dinners. Both restaurants would undoubtedly expand their fare and hours of operation should the demand warrant it. Such expansion is not even required in the surrounding communities. However, should such expansion be warranted, it would undoubtedly immediately follow.

Judge Carter, in deciding this case, very ably stated this concept as follows:

> "Congress passed this law having in mind that this is a competitive society. We have free enterprise. They didn't say so in the statute, but they knew that. We assume they had that in mind. So what happens? If the Anderson commissary should close down, I haven't a doubt but what the people who operate restaurants in the town of Darwin would expand their facilities if there was trade coming into these other restaurants. If men came and wanted meals, I don't know of any merchant that would turn away business that comes to his door, and I haven't a doubt but what if the Anderson operation would close down, outside of some slight initial period of readjustment, that the needs of the workers in the industry could be well taken care of probably right in the town of Darwin, not even having to worry about these towns 14 to 38 miles away." [Tr. 164.]

(4) *Actual Experience Elsewhere With Appellees' Type of Facility Under Similar Circumstances, Demonstrates That Such Facility Is Not Closely Related or Directly Essential to the Production of Goods for Commerce.*

Expert evidence, which is uncontradicted, establishes that the type of facility involved here has become less and less frequent as a means for providing food and lodging for mining employees. Because of improved roads, better transportation and an increased desire for community living, such employees will tend more and more to live in communities at considerable distances from their place of work. It is frequent that persons employed in mining operations will live in communities at a distance of 30 to 40 miles from their places of work and commute daily by automobile, bus or other means of transportation. This is most relevant evidence establishing that the activities of Appellees' employees are not closely related or directly essential to production of ore for commerce.

Expert and uncontradicted testimony also establishes that on several occasions in mining communities in the Western states, facilities similar to those involved here and under circumstances similar in material respects to those of Appellees' operation, had been curtailed or abandoned without affecting either the production of the mine or the availability of employees.

Typical of such a situation is the United States Mining Co., near Bingham, Utah, which shut down its lodging and boarding facility entirely in 1946. In another instance, an Appellee-type facility under similar circum-

stances was completely destroyed by fire. It has not been rebuilt. The employees in each case who formerly lived and ate at the Appellee-type facility continued their employment and obtained their lodging and meals elsewhere, In some cases, the facilities in nearby towns expanded to take care of the increased demand. In others, the employees located in communities at some distance from the mine and commuted daily. In still others, the employees obtained housing facilities and provided their own meals. Neither production nor the availability of employees was substantially affected [Tr. 71].

Another situation is the Mountain City Copper Company operation, located about four miles from the town of Mountain City, Utah, where a facility similar to that of Appellees' was established. Family facilities—houses and apartment units—were available for about 150 families. About 100 single men obtained lodging and meals at a facility similar to Appellees' operated by an independent contractor. During a period of some 12 years from 1935 to 1947, the number of persons who utilized this facility steadily decreased until at the end of the period it had been discontinued entirely and had been taken over by a man and his wife who provided lodging and meals for 18 to 20 employees. The remaining 75 or 80 were lodging and eating elsewhere, or rotating between the various facilities in the area. During the same period people in the town of Mountain City—population about 200 in 1935—began taking in boarders. Eventually, there were two rooming houses and a hotel operating in the

town. The mine facility became unattractive as a business proposition. Its discontinuance did not affect the production of the mine. During the period involved the number of employees remained at approximately 300 [Tr. 70-71].

In many mining operations, no facilities such as Appellees' have existed at all. Persons employed at such mining operations have lived or are living at distances ranging from 30 to 38 miles and commute by automobile or bus daily to and from the mine. In some cases as many as one-half of the employees at the mine will so commute. Among several specific instances are the Utah-Delaware Mining Company and other mining operations in Bingham Canyon, Utah, and the National Tunnel and Mines Company, Tooele, Utah [Tr. 71-72].

Judge Carter in his opinion in this case stated:

> "I think that this commissary, boarding house, was more essential to the mining operation when it first started than it is now, and the longer the operation progresses there the less essential it will be. It is a convenience, a convenience particularly to the type of man who has no family or who is willing to leave his family and go in and take a job. But I can't find that its operation is essential to the production of goods. . . ." [Tr. 164-165.]

In support of this statement are the following facts:

In 1945 production at the Darwin mine amounted to 150 tons per day. There were 6 housing units and 20 trailers at the mine; and Appellees' facilities were somewhat more utilized than today. During 1953, produc-

tion was approximately 450 tons per day. There are 61 housing units and 37 trailers at the mine; and an average of 62 persons reside in Appellees' facilities. During this period employment has correspondingly increased at the mine [Tr. 72].

It is difficult to see, under the facts of this case, how it can seriously be urged that Appellees' facilities are closely related and directly essential to the production of goods. The overwhelming evidence in the case is directly to the contrary. In most respects the evidence is uncontradicted. Appellee's facilities are a matter of convenience and not of necessity. The District Court so found.

Appellant's major effort is to extend the holding in the *Womack* case to the quite different factual situation of this case.

That case, however, does not warrant the finding urged by Appellant. In addition, the principal basis for the holding in that case was removed by the later decision of the United States Supreme Court in the *McLeod* case. Furthermore, the 1949 amendment to Section 3(j), which section controls this decision, both by its plain wording and by its very explicit legislative history, requires that the judgment of the District Court be affirmed.

II.

Assuming the Act Were Held to Cover the Activities of Appellees' Employees, Appellees' Business Is Exempt as a Retail or Service Establishment Within the Meaning of Section 13(a)(2).

We believe that the facts in this case clearly warrant a holding that the Act was not intended to cover the activities of Appellees' employees and that the District Court's decision in this respect should be affirmed. In the event, however, that this Court should find that the Act does cover such activities, Appellees' operation is nevertheless exempt as a retail and service establishment within the meaning of Section 13(a) (2).

A. In the Event the Court Should Find Coverage, It Can Then Consider the Application of Sections 13(a)(2) and (1).

Although Judge Carter also found that Appellees' operation was a retail and service establishment under that section [Tr. 165], no findings were made on this issue or on the issue involving Section 12(a) (1), discussed below, because such findings were unnecessary in view of the finding on the coverage question.

We submit, however, that such questions may be decided upon the basis of the present record without the necessity of remanding the case to the District Court for retrial on this question, with consequent time and expense to the parties involved. In both the Answer [Tr. 13] and in the Pre-trial Stipulation and Order, the issues concerning the application of Sections 13(a) (2) and 13(a) (1) of the Act, were raised [Tr. 30-31 and 83]. The parties proceeded to trial on the basis of all three issues. Both parties presented their case upon the basis

of the issues raised by Section 13(a) (2) and 13(a) (1), as well as on the question of coverage [Tr. 148-161].

The evidence concerning the exemption questions is established by stipulation or by uncontradicted evidence. A substantial part of the evidence is documentary [Def.-App. Exhibits A through H, inclusive].

Under these circumstances should this Court find that the Act covers the activities of the employees involved here, it can then consider the application of Section 13(a) (2) and 13(a) (1) upon the basis of the present record.

Thus, in *Sbicca-Del Mac v. Milius Shoe Co.* (8th Cir. 1944), 145 F. 2d 389, the Eighth Circuit Court of Appeals stated:

> "The trial court made no findings of fact nor conclusions of law, as required by Rule 52(a) of the Rules of Civil Procedure, upon the defenses of ouster and waiver. Since the facts relied upon to support these two defenses are in the record and undisputed we shall not remand the case for this reason alone but will in the exercise of our jurisdiction under such circumstances consider and determine them. See Mayo v. Lakeland Highlands Canning Co., 309 U. S. 310, 316, 60 S. Ct. 577, 84 L. Ed. 774; Helfer v. Corona Products, 8 Cir., 127 F. 2d 612; Knapp v. Imperial Oil & Gas Products Co., 4 Cir., 130 F. 2d 1, 3; Hurwitz v. Hurwitz, 78 U. S. App. D. C. 66, 136 F. 2d 796; Brown v. Quinland, Inc., 7 Cir., 138 F. 2d 228, 229; Bowles v. Russell Packing Co., 7 Cir., 140 F. 2d 354."
>
> *Sbicca-Del Mac v. Milius Shoe Co.,* 145 Fed. 2d 389, 400.

In *Flotation Systems v. United States* (9th Cir. 1943), 136 F. 2d 483, this Court stated:

> "In its answer Flotation pleaded by way of offset the sum of $705.72 paid by it in discharge of certain bills which it was said Pollia should have, but did not, pay. Flotation offered evidence in support of this offset, and so far as we can see there is no countervailing proof. The court made no finding on the subject and no award. On the appeal counsel for Flotation has insisted that it was entitled to credit for this amount, whereas counsel for Pollia has failed to discuss the subject at all. We conclude that an offset against the judgment in the sum of $705.72 should have been allowed. . . ."
>
> *Flotation Systems v. United States,* 136 F. 2d 483, 484.

B. The Evidence, Which Is Uncontradicted, Clearly Shows That Appellees' Facility Is a Retail or Service Establishment Under Section 13(a)(2).

Section 13(a)(2) of the Act provides:

> "SEC. 13. (a) The provisions of sections 6 and 7 shall not apply with respect to . . . (2) any employee employed by any retail or service establishment, more than 50 per centum of which establishment's annual dollar volume of sales of goods or services is made within the State in which the establishment is located. A 'retail or service establishment' shall mean an establishment 75 per centum of whose annual dollar volume of sales of goods or services (or of both) is not for resale and is recognized as retail sales or services in the particular industry; . . ."

This definition sets up three criteria to determine what constitutes a retail or service establishment:

(1) More than 50% of the establishment's annual dollar volume of sales of goods or services must be made in California.

(2) 75% or more of the establishment's annual dollar volume of sales of goods or services, or both, must not be for resale.

(3) 75% or more of the establishment's sales or services must be recognized as retail sales or services in the particular industry.

The first two of these criteria have been established by the Stipulation of Facts and incorporated in the Findings of Fact [Tr. 73] which provide:

> "(18) All of defendants' annual dollar gross income at their Darwin operation results from the furnishing of goods and services within the State of California.
>
> "(19) All of the meals served, goods sold or lodging furnished by defendants at their Darwin operation are to persons who consume such meals or goods or utilize such services in the Anaconda area and within the State of California."

With respect to the third requirement, namely that 75% or more of the annual dollar volume of sales of goods or services must be recognized as retail sales or services in the particular industry, Appellees have introduced the following evidence, which is uncontradicted:

(a) The testimony of the Secretary and General Counsel of the National Restaurant Association who testified that his Association represented approximately 80% of the total dollar volume of the restaurant industry in the

United States; that he was familiar with Appellees' type of operation; that Appellees were members of his Association; that the term "retail sale or service" has a recognized meaning in the restaurant industry; that such term is defined as the sale or service of a meal to the consumer, and generally consumed on the premises of the establishment; that Appellees' sales and services are included within this definition and are recognized and known as retail sales and services in and by the restaurant industry; that the type of establishment operated by Appellees was part of the restaurant industry and participates in the activities of the Association in the same maaner as its other types of operations; that Appellees' and similar operations are treated as part of the restaurant industry for the purposes of publications, conventions and other activities. Various documents were introduced as further proof of the foregoing [Tr. 148-154; Def.-App. Exhibits A to E inclusive].

(b) It was stipulated that the Secretary of the Southern California Restaurant Association would testify substantially the same with respect to the Southern California area[8] [Tr. 150, 160-161; Def.-App. Exhibit H].

(c) Testimony and documents establish that the United States Bureau of Census in its 1948 Census of Business and in its proposed 1953 Census of Business placed Appellees' type of activity in the category of a retail trade [Tr. 152-153; Def.-App. Exhibit F].

(d) Testimony and documents were introduced to show that the United States Office of Price Administration,

---

[8]Appellant's statement (App. Br. 8) that only one witness testified on this subject is therefore incorrect.

during the period of its existence, included Appellees' type of establishment in its survey and compilation of statistics concerning the restaurant industry [Tr. 153-154, Def.-App. Exhibit G].

This evidence shows that the trade associations of which Appellees are a part, both national and state, the United States Census Bureau and the United States Office of Price Administration during its existence, all recognize that Appellees' sales and service are retail sales or services in the industry of which Appellees are a part.

Appellant did not introduce a single item of evidence to rebut this proof. Appellant did introduce its Exhibit 4, Interpretative Bulletin; Part 779, Title 29, Chap. V, Code of Federal Regulations, presumably for the purpose of showing that the Administrator of the Act had found that Appellees' type of operation was not so recognized. It completely fails to do so. In the first place, no evidence whatever was introduced by Appellant to show that the Administrator had even made an investigation or determination which would cover Appellees' type of operation. There is nothing to show that the Administrator himself does not consider Appellees' activities to be recognized as a retail sale or service in the industry. Furthermore, it should be noted that the question is not whether the Administrator recognizes the activity as a retail sale or service. The criterion is whether or not the activity is so recognized *in the industry*. The Administrator himself has made no finding that it is not.

The Act and the Congressional history on the subject have not confined the evidence on this question. On the contrary, the Congressional history is conclusive that the question is not to be decided by the Administrator alone,

by trade organizations alone, or by any other persons or organizations alone, but rather that all evidence which would bear upon this issue should be considered by the Court.

Senator Holland, who was the sponsor of the amendment to Section 13(a), which was adopted by Congress, said in debate on the amendment:

> "Mr. Douglas: I understand that the interpretation which would be made would be that given to 'retail sale' by a trade association.
>
> Mr. Holland: That is one criterion, of course; but I do not believe the Senator from Illinois, and certainly not the Senator from Florida, would wish to delegate full authority in the matter to a trade association or any other interested group.
>
> Mr. Douglas: Its interpretation would be very persuasive, would it not, even if not controlling?
>
> Mr. Holland: Yes, it would be quite persuasive." (95 Cong. Rec. p. 12501.)

> "Mr. Holland: . . . The question is what constitutes a retail sale and what constitutes service, and in each case that is not defined in the Act, but instead is defined variably in various industries, by determining what are the habits and practices in the industry.
>
> Mr. Aiken: Let me put the question in another way. Why are these words necessary to the amendment, and in what way do they strengthen and clarify it?
>
> Mr. Holland: They make it very clear, crystal clear, that no one standard can apply to every type of business, but that the standard we are trying to write is to give weight to a certain type of sale, which is a bona fide retail sale, and for the determination of that the Administrator and the courts, as well

> as the people who are in business, are warned that the rules prevailing in the business, the understanding of the term in the business, would apply with complete knowledge that the same understanding may not apply in different businesses, because the same standard or rule cannot at all be safely applied to all businesses."
>
> (95 Cong. Rec. p. 12510.)

All the evidence in this case supports the finding that Appellees' operation is recognized as a retail sale or service in the industry. This evidence is substantial and stands uncontradicted and unrebutted. At least two-thirds of the necessary proof on this question was stipulated, and the remaining one-third was established by substantial, uncontradicted evidence.

Prior to its amendment in 1949, Section 13(a)(2) of the Act provided:

> "The provisions of Section 6 and 7 shall not apply with respect to . . . (2) any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce."

The Administrator was strongly criticized in Congress, prior to the adoption of the 1949 amendments, for his erroneous conclusions as to what constituted a retail or service establishment under this section. The Administrator had gone so contrary to recognized concepts of a retail transaction that Congress in the 1949 amendments established specified criteria to be applied in determining this question.

There can be no doubt that the type of operation involved here is within the retail or service exemption, even

assuming coverage. The legislative history resulting in the amended Section 13(a)(2) is clear.

The text of the House Managers' Statement[9] reporting on the House-Senate conference bill which contained the 1949 amendments as adopted, includes the following:

"EXEMPTIONS

"*General statement.*—The House bill substantially revised Section 13(a)(2) of the Act relating to retail and service establishments. . . ."

* * * * * * * *

"*Retail and service establishments.*—Both the House bill and the Senate amendment contained an identical amendment providing for an exemption for retail and service establishments (Sec. 13(a)(2)). The amendment was continued in the conference agreement.

"The amendment (Sec. 13(a)(2)) agreed to in conference clarifies the existing exemption by defining the term 'retail or service establishment' and stating the conditions under which the exemption shall apply. This clarification is needed in order to obviate the sweeping ruling of the Administrator and the courts, that no sale of goods or services for business use is retail. See *Roland Electrical Co. v. Walling* (326 U. S. 657; *McComb v. Diebert* (E. D. Pa. 1949), 16 Labor Cases, Par. 64,982; *McComb v. Factory Stores* (81 F. Supp. 403 (N. D. Ohio 1948)).

"Under paragraph (2) of Section 13(a) as agreed to in conference, an establishment is an exempt retail or service establishment if it meets three tests:

---

[9]House of Representatives Report No. 1453, 81st Congress, 1st Session, October 17, 1949.

"First, over 50 per cent of the establishment's sales by annual dollar volume of goods or services must be made within the state in which the establishment is located. The requirement that the greater part of the selling or servicing be in intrastate commerce, found in the present law, is eliminated because of the tendency of the courts to hold that many sales or services made or performed within a state are not intrastate sales or services. See *Kirschbaum v. Walling* (316 U. S. 517, 526); *Boutell v. Walling* (327 U. S. 463, 467). Under the new test, if the sales are made within the state in which the establishment is located, it is immaterial that the sales (a) are made pursuant to prior orders from customers, (b) contemplate the purchase of goods by the establishment from outside the state to fill customers' orders, or (c) *are made to customers who are engaged in interstate commerce or in the production of goods for interstate commerce.* In this connection, see *Walling v. Jacksonville Paper Co.* (317 U. S. 564).

"The second test provides that in order for an establishment to be exempt, not less than 75 per cent of its annual dollar volume of sales of goods or services (or both) must not be for resale. In other words, at least three-fourths of the goods or services (or both) sold must be to purchasers who do not buy for the purpose of reselling. Normally, goods are to be considered as sold for resale even though the purchaser sells them in an altered form. . . ."

"The third test provides that 75 per cent of the establishment's annual dollar volume of sales of goods or services (or of both) must be recognized in the particular industry as retail sales or services. *Under this test any sale or service, regardless of the type of customer, will have to be treated by the Admin-*

istrator and courts as a retail sale or service, so long as such sale or service is recognized in the particular industry as a retail sale or service. Thus, the sale by a farm implement dealer of farm machinery to a farmer will be retail if the sale is recognized as retail in such industry. So, too, sales by the grocery store, the hardware store, the coal dealer, the automobile dealer selling passenger cars or trucks, the clothing store, the dry goods store, the department store, the paint store, the furniture store, the drug store, the shoe store, the stationer, the lumber dealer, etc., whether made to private householders or to business users, will be retail so long as they are recognized as retail sales or services in such industries. Likewise, *sales or services of hotels, restaurants,* barber and beauty shops, repair garages, filling stations and the like, *whether made or rendered to private householders or to business customers,* will be retail so long as they are recognized as retail sales or services in such industries.

"The location of the establishment, whether in an industrial plant, an office building, railroad depot, or a Government park, etc., will make no difference in the application of the exemption. So long as the establishment meets the tests described above, it will be excluded from the minimum wage and overtime provisions of the Act."

House Managers' Statement (House of Representatives Report No. 1453, 81st Congress, 1st Session, October 17, 1949; 95 Cong. Rec. 14931-14932, October 18, 1949).

Senator Holland, who sponsored the adopted amendment, had the following to say concerning it:

"Mr. Holland: The amendment which we have introduced has been a product of several months'

work and discussion. It was placed in its present form some two months ago and has had wide circulation. I have had numerous inquiries as to its effect upon various situations and its effect upon various court decisions. I have been asked the following questions:

* * * * * * * *

"Question. What type of service establishments would the proposed amendment exempt?

"Answer. Generally, restaurants, hotels, repair garages, watch-repair establishments, beauty parlors, barber shops, hospitals, farm equipment repair shops, laundries, dry-cleaning establishments, valet shops, battery shops, refrigerator repair shops, typewriter repair shops, taxicab companies, exterminator service companies, and other establishments performing local services.

"Question. Is there any doubt about the application of the existing retail and service establishment exemption in the law to hotels?

"Answer. Yes. Applying the philosophy of the *Roland* decision, there is doubt whether a hotel engaged primarily in serving commercial travelers or business customers, is exempt.

"I may say in amplifying that statement in my prepared remarks, Mr. President, that I have already mentioned, during the Colloquy, the fact that *there are at least two other reasons why the hotel and restaurant people are most apprehensive. The first of those is the ruling of the Federal court to the effect that a restaurant which is located within or near a factory, and which primarily is serving the employees of the factory, but which is also serving the general public who come there, and at the same price, cannot be exempted, even though its business is entirely*

separate and it is run by persons who have no connection at all with the manufacturing business."

* * * * * * * *

"Mr. President, the pendency of these two matters which I have mentioned, plus the uncertain effect of the Roland decision, have presented such a situation to the hotel people and the restaurant people that they do have apprehension and they have every justification for being anxious as to what their status is, and for asking that their status be clarified as this Act is being amended.

"Question. Have the courts ever held that a hotel or restaurant was not entitled to the exemption?

"Answer. *Yes. It has been held that a restaurant located in a factory, operating as an independent establishment and wholly unconnected in ownership and management with the factory, was not entitled to the exemption, notwithstanding that the restaurant sold and served its food directly to the employees of the factory and others of the general public. McComb v. Factory Stores* (81 F. Supp. 403 (N. D. Ohio, 1948)). The exemption was denied on the basis of the decision in the *Roland* case."

95 Cong. Rec. pp. 12505-12506.

Additional quotations from the legislative history concerning the amendment to Section 13(a)(2), including a statement by Senator Taft, are set forth in the Appendix, pp. 4-8.

It was the stated purpose of Congress that the term "retail" be applied in its customary and usual sense. It was for this reason that the industry test was applied. The Administrator had so distorted this term in its regulations and bulletins that Congress felt it was necessary to re-establish specifically its original meaning.

In the instant case, Appellees' facilities were available to the public and were utilized by other than employees of Anaconda, to a limited extent. The legislative history makes it clear, however, that there is nothing in the criteria established by Section 13(a)(2) which requires that the service should be principally to the general public.

The facts are stipulated that each employee and each guest, visitor or member of the public pays the stated price for meals. The sales are made directly to the employees, who then pay for such meals. The fact that Anaconda may pay a sum to Appellees in the event the gross profit falls below a certain figure, is not a material consideration. Furthermore, there is no guarantee of net profit. The criteria established by the Act are whether or not 75 per cent of the annual dollar volume of sales of goods or services is for resale and is recognized as retail sales or services in the particular industry. It is the nature of the sale that is the significant factor. The annual dollar volume has reference to the return from these sales from whatever source.

If the three specified criteria are met, the operation constitutes a retail or service establishment under Section 13(a)(2). The extraneous factors referred to by Appellant cannot affect this result.

It is clear from the requirements of Section 13(a)(2), explicitly confirmed by the legislative history resulting in the amendment of that section, that Appellees' establishment is a retail and service establishment. Of the three criteria, two have been established by stipulation; the third has been established by substantial and wholly uncontradicted evidence. Therefore, should the Court determine that the Act covers Appellees' employees, Appellees are nevertheless exempt under Section 13(a)(2).

III.

Assuming the Act Were Held to Cover the Activities of Appellees' Employees, Appellees' Employees Are Exempt Under Section 13(a)(1) of the Act.

Section 13(a)(1) provides:

> "The provisions of Section 6 and 7 shall not apply with respect to (1) any employee employed in a bona fide executive, administrative, professional, or local retailing capacity, or in the capacity of outside salesman (as such terms are defined and delimited by regulation of the Administrator); . . ."

The Administrator of the Act in this section was given specific authority to establish the criteria for this exemption. He has done so as follows:

> "The term 'employee employed in a bona fide * * * local retailing capacity,' in Section 13(a)(1) of the Act, shall mean any employee:
>
> "(a) who customarily and regularly is engaged in:
>
> (1) making retail sales of goods or services of which more than 50 per cent of the dollar volume are made within the state where his place of employment is located, or
>
> (2) performing work immediately incidental thereto, such as the wrapping or delivery of packages; and
>
> (b) whose hours of work of a nature other than that described in paragraphs (a)(1) or (a)(2) of this section do not exceed 20 per cent of the hours worked in the workweek by nonexempt employees of the employer."
>
> Regulations, Part 541, Section 541.4, Title 29, Chap. V, Code of Federal Regulations.

In view of the facts, most of which have been stipulated, and the uncontroverted evidence, it is quite clear that each of the employees of Appellees are exempted according to the tests established by this section. The duties of such employees are described in the Stipulation of Facts [Tr. 27-29], which were incorporated in the Findings of Fact [Tr. 66-68].

It has also been stipulated and found that more than 50 per cent of the dollar volume of sales of goods or services are made within the State of California, the place of employment [Tr. 29, 73]. There can be no question that each employee performs work immediately incidental to, indeed directly involved in, the sale of such goods or services. Not only 80 per cent, but 100 per cent, of the hours of work are involved in such activities.

Therefore, even according to the definition of the Administrator himself, each of such employees is exempt from the requirements of Sections 6 and 7 under Section 13(a)(1).

Conclusion.

For the foregoing reasons, we submit that:

(1) The Act does not cover the activities of the employees of Appellees in this case.

(2) Even if such activities were held to be covered by the Act, Appellees' operation is exempt as a retail and service establishment under Section 13(a)(2) of the Act.

(3) Even if the activities of Appellees' employees were held to be covered by the Act, each of the employees of Appellees is exempt as engaged in a local retailing capacity under Section 13(a)(1) of the Act and the regulations of the Administrator thereunder.

Therefore, the action of the District Court in dismissing the complaint and denying injunctive and other relief should be affirmed.

Dated November 19, 1954.

Respectfully submitted,

GIBSON, DUNN & CRUTCHER,
WILLIAM FRENCH SMITH,
JAMES J. RYAN,

By WILLIAM FRENCH SMITH,
Attorneys for Appellees.

APPENDIX.

The Effort to Continue the Law as It Had Been Interpreted, Was Specifically Rejected by the Defeat of an Amendment Designed to Accomplish This Result.

"The clerk read as follows:

Amendment offered by MR. JAVITS: On page 4, line 21, strike out the words 'in any closely related process or occupation indispensable to the production thereof, in any State.' and insert 'or in any process or occupation necessary to the production thereof, in any State.'

"MR. JAVITS. Mr. Chairman, the purpose of this amendment is very simple. It is to test whether or not the Lucas substitute is really a restrictive bill or whether it is a clarifying bill.

"Mr. Chairman, it is estimated that this little word 'indispensable'—a remarkably restrictive word in any statute—that this little word 'indispensable' may throw as many as 750,000 employees in the United States who, by all previously accepted standards, are engaged in interstate commerce out from under the protection of the minimum-wage law Mr. Chairman, that danger applies particularly to clerical and office employees, maintenance and service employees, repair-service employees, business-service employees, and many others. They will be left by the Lucas substitute completely at the mercy of a word which is apparently picked because it is of the utmost restriction and not because it is clarifying.

* * * * * * * *

"Mr. McConnell. The whole idea we have opposed here is the theory of bringing in certain types of people who were never intended to be brought in when this act was written. This is an effort to clarify that. Do you consider window cleaners to be in interstate commerce?

"Mr. Javits. When employees are working for a company that is engaged in interstate commerce and their work is necessary to that commerce, they should be covered by the act. *Please note that I am seeking only to continue existing law by my amendment.*

"Mr. McConnell. I think that is stretching it.

* * * * * * * *

"Mr. Jacobs. I wish to say to the gentleman that I support his amendment and I want to endorse what he says when he says it is a test of whether or not those who are talking about leaving people out of coverage really want to support complete coverage that was in the old act.

* * * * * * * *

"Mr. Javits. *All I am trying to do by my amendment is to restore the language of the act which has been thoroughly interpreted.* What you are seeking to do here by the substitute is something that no one has argued for before, because, unless Members vote for my amendment to restore basic coverage of the Lucas substitute back to the coverage of the act as it stands now, it is definitely an effort to take thousands and thousands of employees

out from under this act who should not be out from under it. This is the acid test. This will tell us whether or not the proponents of the Lucas substitute are serious when they say it is clear and precise and clarifying, or whether their intention really is to restrict the operation of the present law and to take thousands of people out from under the protection of the Fair Labor Standards Act, as indeed this word 'indispensable' in the Lucas substitute will do.

"The CHAIRMAN. The question is on the amendment offered by the gentleman from New York [Mr. JAVITS].

"The question was taken; and on a division (demanded by MR. JAVITS) there were—ayes 88, noes 109.

"MR. JAVITS. Mr. Chairman, I demand tellers.

Tellers were ordered; and the Chairman appointed MR. LUCAS and MR. JAVITS to act as tellers.

"The Committee again divided; and the tellers reported there were—ayes 91, noes 133.

"So the amendment was rejected."

(95 Cong. Rec. 11216-11217.)

Additional Quotations From the Legislative History of the Amendment to Section 13(a)(2) of the Act.

Senator Taft, in debate upon the adopted amendment, said:

"Mr. Taft: . . . It is true that the Wage-Hour Administration, with the assistance of the courts, has steadily encroached on the exemption which was contained in the original act relating to retail establishments.

* * * * * * * *

"What is a retail establishment? I think everyone knew what a retail establishment was, and there were included in the list those who sold automobiles one by one, those who sold farm machinery to farmers. Retail stores of all kinds, hardware stores, the ordinary laundry, all but the most exceptional laundry, in the minds of all of us are retail establishments. Those are the establishments Congress intended to exempt. But what has happened under the law is that the Administrator has found new ways of encroaching on the exemption.

* * * * * * * *

"Under this concept, the Administrator, with some support from the courts, made rulings in the case of those selling automobiles, under which, if I buy an automobile for my own use, for ordinary pleasure purposes, that is a retail sale, but if an automobile salesman sells a truck to a commercial establishment, that is not a retail sale. He does not dare say it is a wholesale sale, because we all know it is not a wholesale sale. He says it is a nonretail sale. Under that concept he has gradually excluded a large number of dealers on the theory that the test is the purpose of the use to which the article is to be put, and if it is to be used in a business instead of in a home, it is a nonretail sale.

"In the case of those who sell farm machinery, the Administrator is implying, with the assistance of the courts, that a farm machinery dealer who sells a tractor or a plow to a farmer is not a retail establishment, because the farmer is not going to use the article just for his own pleasure, he is going to use it to plow the land and make crops which are then to be passed on by him, sold to somebody else.

"It is said that a man may sell only in small lots, in an ordinary retail sale, as a retail store, yet if he sells to a factory, and the factory is not going to consume the articles, but use them as tools in the factory, that is not a retail sale. In that way the Administrator has gradually encroached in this whole field, until all stores are doubtful today whether or not they are going to be retail establishments for many months to come.

"Let us take a stationery store which sells legal forms, and all kinds of stationery. The Administrator says if those forms are sold to a lawyer who is using them in his business, that is not a retail sale, because the purpose of the buyer is not to consume them; it is to use them in his business.

"Take a furniture store which sells furniture. It would not be a retail furniture store if it should sell a certain amount of furniture for office use to people who use the furniture in offices. That concept, to my mind, is utterly erroneous, and it has resulted in a steady encroachment against the retail establishment, until many retail establishments do not have the faintest idea whether or not they are to remain retail establishments and be exempt under the Act." 95 Cong. Rec. pp. 12515-12516.

"Mr. Holland: So, too, sales by the hardware store, the coal dealer, the automobile dealer, the dry goods store, the paint store, the furniture store,

the stationer, and so forth, whether made to private householders or to business users, will be retail, so long as they are not for resale and are regarded as retail sales or services in such trades. Likewise, the services of hotels, restaurants, repair garages, filling stations, and the like, whether rendered to private householders or to business customers, will be retail so long as they are regarded as retail services in such trades. No longer will it be possible for the Administrator to rule, as he has under the present law, that if a drug store sells drugs to a physician or hospital, the sale is not retail, but if it sells drugs to a private household consumer, the sale is retail; or that if an automobile dealer sells a truck to the local butcher, baker, or grocer, the sale is not retail, but if he sells a passenger car to a private consumer, the sale is retail. . . ."

* * * * * * * *

"Anyone opposing the proposed amendment must necessarily take the position that Congress, in granting the retail and service establishment exemption, intended to reject what is traditionally recognized as a retail sale or service in industry, and to adopt an arbitrary concept of what is retailing or servicing which has no meaning in industry.

"I call particular attention to that. The Congress used the terms 'retail' and 'service establishment' in their customary meaning, in their customary application, as they were customarily understood in the various industries of the nation. How anyone now could oppose the giving of that concept to complete reality through this amendment, I fail to see, because it would simply carry out clearly what was the intention and objective of those who offered the original Act, and those who voted for it and brought it to passage.

"The industry recognition test which we have proposed is a simple one. . . ."

95 Cong. Rec. 12502.

"Mr. Holland: Mr. President, the doubt arose because the Administrator and the courts, including the United States Supreme Court, ruled that the sale of goods and services for business use, as distinguished from family or household use, was not retail. I cited several cases which I shall read into the record at this time, though I do not propose to weary the Senate by quoting from the cases:

"*Roland Electrical Co. v. Walling* (326 U. S. 647); *Boutell v. Walling* (327 U. S. 463); *Martino v. Michigan Window Cleaning Co.* (327 U. S. 173); *McComb v. Deibert* (E. Dist. Pa. 1949), 16 Labor Cases, par 64,982.

"The Administrator's position is succinctly summarized in his 1948 annual report to Congress, page 119, in which he says:

> 'The basic test in determining whether a sale is a retail sale, is the purpose of the buyer. A transaction in which goods are bought for personal use by a private consumer, is a retail sale; the sale of goods for resale or other business use or, in general, for use by any purchaser other than the private consumer, is a nonretail transaction.'

"This ruling of the courts and the Administrator was completely novel and theretofore unheard of in any of the retail trades. The ruling meant that the following sales would not be retail:

> 'By a farm implement dealer to farmers for business purposes rather than for personal use; by an automobile dealer of trucks for business use; by a hardware store to business customers; by a

coal dealer to apartment houses; and by a dry goods store, a paint store, a furniture store, a stationer, a lumber dealer, and many of the other countless retailers in the nation to business customers. (Supplemental Views of Senators TAFT and DONNELL in S. Rept. No. 640, 81st Cong., 1st Session, the Senate Labor Committee Report on S. 653, p. 9).'

"These rulings, and the few decisions which have been based upon them, together with the more strained rulings which have resulted from those decisions, have brought about the present situation, which I think compels the Congress to pass clarifying legislation."

Cong. Rec. p. 12496.